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R. VOIGHT SHEALY
MATERIALS MANAGEMENT OFFICER

December 15, 2008

R. Dean Hackett
General Manager
Trane Comfort Solutions
Charleston Sales office
2011 Clements Ferry Road
Charleston, SC 29492

Re: **DECISION**
IN THE MATTER OF: Protest
HVAC for College of Charleston
IFB NO.: 5400000532
CASE NUMBER: 2008-143

Dear Mr. Hackett:

Please find enclosed the Decision of the Chief Procurement Officer concerning the administrative review held on December 4, 2008, relative to the referenced matter.

If I can be of assistance to you in this matter, please let me know. Also, please note that a copy of this Decision has been posted today on the sixth floor of the Materials Management Office, 1201 Main Street, Columbia, South Carolina.

Respectfully,

R. Voight Shealy
Chief Procurement Officer
for Supplies and Services

enclosure

cc: Keith McCook, Assistant General Counsel
Frank Potts, Assistant General Counsel
John Stevens, State Procurement Officer
Allen Register, Senior Procurement Manager
Cooper Marlowe, Procurement Manager
Debbie Cannon, College of Charleston
Preston Johnson, Carolina Chillers, Inc.

STATE OF SOUTH CAROLINA)	BEFORE THE CHIEF PROCUREMENT OFFICER
COUNTY OF RICHLAND)	
)	
In the Matter of Protest of:)	DECISION
)	
Trane Comfort Solutions)	CASE NO. 2008-143
)	
Materials Management Office)	POSTING DATE:
IFB No. 5400000532)	
HVAC Maintenance)	DECEMBER 15, 2008
<u>College of Charleston</u>)	

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest from Trane Comfort Solutions (Trane). With this invitation for bids (IFB), the Materials Management Office (MMO) attempts to procure heating, ventilation, and air conditioning (HVAC) maintenance for 584 units of residential HVAC equipment on behalf of the College of Charleston (CofC). In the letter, Trane protested MMO's intent to award to Carolina Chillers (Carolina) arguing that Carolina's bid was unreasonably low and unbalanced between Item 1, a unit price for on-call repair service to HVAC equipment¹ and Item 2, required annual preventive maintenance for those 584 units.

In order to resolve the matter, the CPO conducted a hearing December 4, 2008. Appearing before the CPO were Trane, represented by Bill Collar, Dean Hackett, and Henry Knight, Esq.; Carolina, represented by Hank Wall, Esq.; and MMO, represented by John Stevens. The College of Charleston attended, but relied upon MMO to represent its interests.

NATURE OF PROTEST

The letter of protest is attached and incorporated herein by reference.

¹ Since no one could estimate the number of repairs necessary, for Item 1, MMO asked bidders to offer a composite price based upon the labor rate for 1 service technician and 1 laborer for 1 hour.

FINDINGS OF FACT

The following dates and facts are relevant to the protest:

1. On September 2, 2008, MMO issued the IFB. [Ex. 1]
2. On September 10, 2008, MMO closed the question period.
3. On September 15, 2008, MMO issued Amendment No. 1. [Ex. 2]
4. On October 1, 2008, MMO opened the following bids:

<u>Bidder</u>	<u>Item 1</u>	<u>Item 2</u>	<u>Total – Yr. 1</u>	<u>Total – 5 Years</u>
Carolina	\$176.00	\$2,222.00	\$2,398.00	\$11,990.00
Trane	132.00	35,868.20	36,000.20	180,001.00
Johnson Controls	138.90	37,450.00	37,588.90	187,944.50
Cullum Services	145.00	41,665.50	41,810.50	209,052.50
Triad Mechanical	127.50	52,787.00	52,914.50	264,572.50
Palmetto Services	110.00	102,950.00	103,950.00	515,300.00

5. On October 8, 2008, MMO posted a statement of award to Carolina. [Ex. 8]
6. On October 16, 2008, the CPO received Trane's protest.

CONCLUSIONS OF LAW

Trane alleged that Carolina is not the actual low bidder in that Carolina bid an artificially low offer for Item 2, preventive maintenance and an inflated price for Item 1, Repairs. Trane alleged that Carolina will attempt to divert CofC away from Item 2, preventive maintenance, where they bid a price 20 times less than the average of all bids for Item 2, to Item 1, repairs, where they bid 78% higher than the average of the bids for Item 1, which will result in a higher actual cost to the CofC over the life of the contract.

The term for such manipulation of a bid is unbalanced bidding, which would violate the IFB that reads, "The State may reject an Offer as nonresponsive if the prices are materially unbalanced between line items or subline items. A bid is materially unbalanced when it is based on prices significantly less than cost

for some work and prices which are significantly overstated in relation to cost for other work, and if there is a reasonable doubt that the bid will result in the lowest overall cost to the State even though it may be the low evaluated bid, or if it is so unbalanced as to be tantamount to allowing an advance payment.” [Ex. 1, Responsiveness/Improper Offers] An unbalanced bid or proposal is one which appears to be the low offer, but in fact is not.

In order to show unbalanced bidding, two aspects must be proven: 1) the bid was mathematically unbalanced, that there was no reasonable relationship to actual cost and 2) that the bid was materially unbalanced, that CofC will not benefit from the lowest overall cost – the apparent low bid will actually cost more.

- 1) The bid was mathematically unbalanced, as there was no reasonable relationship to actual cost.

There is no question concerning Carolina's obligation to provide the required service under Item 2 in accordance with the material terms and conditions of the solicitation. The specifications for Item 1 require performance of an extensive list of preventive maintenance services.

Simply based upon a comparison of the bids, it may appear that Trane is correct in its allegation that Carolina has offered an unbalanced bid. Compared to the other bidders, it appears there is no way that Carolina can perform the preventive maintenance services required under Item 2 for the price bid. In fact, even after hearing the testimony of Preston Johnson, Account Manager, Carolina, the CPO suspects that Carolina made an error when completing its bid for Item 2. However, when the procurement officer, Cooper Marlowe, noted similar concerns and inquired with Carolina about their commitment to the bid submitted, Mr. Johnson responded, in part:

Our numbers are correct regarding the College of Charleston annual PM bid package. We did not make any mistakes on the bid package. The total bid price was \$2,398.00 per year. We will be able to perform the entire scope of the contract in its entirety per the specifications and the terms and conditions of the contract. . . We have performed work on these units for the last 4 years and are familiar with them, know the location of each and the amount of time needed for the PM. [Ex. 12]

Mr. Johnson went as far as explaining his bidding methodology and even Carolina's profit margin. Under direct questioning and cross examination during the hearing, he reiterated Carolina's commitment to its bid.

CofC personnel stated their satisfaction with Carolina's performance as the incumbent on contract. CofC personnel stated that they had no reason to believe that Carolina would not perform the contract at the stated price.

- 2) The bid was materially unbalanced, that CofC will not benefit from the lowest overall cost – the apparent low bid will actually cost more.

One key to proving unbalanced bidding is to show that a "reasonable doubt" exists that the evaluated offer is actually the lowest. A very simple test that unbalancing exists when: (1) one or more line items is either understated or overstated in relation to its price or cost, and (2) some performance risk will result from acceptance of the offer, or such an award would result in the payment of unreasonable prices. In this case, Carolina's bid is \$168,000 less than Trane's over the five year life of the contract.² Trane implied that Carolina will manipulate the college by not maintaining the CofC equipment to the standards required by the contract and driving up the cost of repairs where Carolina's bid is high. But, CofC has not committed to any level of spending under the IFB requirements for Item 1, repairs. For that matter, the College has not guaranteed Carolina any level of business for repairs or any repair business at all. Therefore, it is improbable that Carolina's bid will actually prove to be higher than Trane's.

² This presumes that the College of Charleston decides to require preventive maintenance only annually. Should it be required twice annually, the number would double.

DETERMINATION

Typically, unbalanced bidding occurs in one of two situations: (1) When a bidder attempts to frontload costs for a multi-year contract during the initial period of the contract requiring the State to overpay early or (2) On a multiple line item bid, when a bidder artificially understates the prices of items known to be seldom purchased and artificially inflates the prices of items bought most often. In both cases, absent careful analysis of the bids, one may unknowingly award the contract to an apparent low bidder who is not, in fact, low.

In decisions regarding allegations of unbalanced bidding, the U.S. Comptroller General has written:

OUR OFFICE HAS RECOGNIZED THE TWO-FOLD ASPECTS OF UNBALANCED BIDDING. THE FIRST IS A MATHEMATICAL EVALUATION OF THE BID TO DETERMINE WHETHER EACH BID ITEM CARRIES ITS SHARE OF THE COST OF THE WORK PLUS PROFIT, OR WHETHER THE BID IS BASED ON NOMINAL PRICES FOR SOME WORK AND ENHANCED PRICES FOR OTHER WORK. THE SECOND ASPECT- MATERIAL UNBALANCING- INVOLVES AN ASSESSMENT OF THE COST IMPACT OF A MATHEMATICALLY UNBALANCED BID. A BID IS NOT MATERIALLY UNBALANCED UNLESS THERE IS A REASONABLE DOUBT THAT AWARD TO THE BIDDER SUBMITTING A MATHEMATICALLY UNBALANCED BID WILL NOT RESULT IN THE LOWEST ULTIMATE COST TO THE GOVERNMENT. CONSEQUENTLY, ONLY A BID FOUND TO BE MATERIALLY UNBALANCED MAY NOT BE ACCEPTED. PROPSERV INCORPORATED, B-192154, FEBRUARY 28, 1979, 79-1 CPD 138; MOBILEASE CORPORATION, 54 COMP.GEN. 242 (1974), 74-2 CPD 185. IN THE PRESENT CASE, THE CONTRACTING OFFICER FOUND THAT J.A.'S FIRST YEAR BID PROPERLY REFLECTED ITS PROPORTIONAL SHARE OF THE COST OF THE TOTAL CONTRACT, SINCE IT INCLUDED EQUIPMENT AND SETUP COSTS. HOWEVER, EVEN IF IT WERE MATHEMATICALLY UNBALANCED, IT IS REASONABLY CERTAIN THAT THE FINAL COST TO THE GOVERNMENT WILL BE \$64,975.70, AFTER EXERCISE OF THE OPTION YEARS, WHICH WILL BE SIGNIFICANTLY LOWER THAN THE NEXT LOW, J.A., BID, WHICH WAS FOR A TOTAL OF \$115,708.30; THUS LANE'S BID IS NOT MATERIALLY UNBALANCED. RELIABLE TRASH SERVICE, B-194760, AUGUST 9, 1979, 79-2 CPD 107.³ [61 Comp. Gen. 444, B- 205611, 82-1 CPD P 542, 1982 WL 26635 (Comp.Gen.)] [Emphasis added]

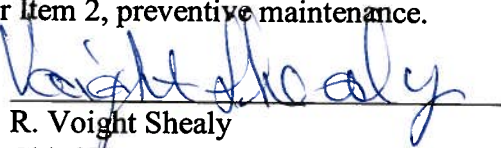
³ Decisions of the U.S. Comptroller General are not controlling in S.C. State Government protests, but are quoted as enlightening.

Trane's underlying allegation is that Carolina will perform the preventive maintenance so poorly that equipment will fail prematurely resulting in unreasonable repair costs to CofC. In that event, the State is protected by strict performance requirements for Carolina, cancellation options for cause and convenience, renewal options from year to year, and most importantly, optional use of Carolina for repair services. Carolina clearly acknowledged during the hearing that CofC is not obligated under the IFB to utilize it for any repair services.

Regarding cost, Trane has failed to prove that Carolina's bid will actually cost CofC more money over the life of the contract, if for no other reason than the fact that the IFB does not guarantee the successful bidder any repair business. During the hearing, both Trane and Carolina acknowledged that the solicitation merely required bidders to offer a unit rate for HVAC repairs over the life of the contract; CofC is not bound to utilize the successful bidder for repair services. Trane's argument that Carolina understated its bid for Item 2 in order to offload CofC's activities to Item 1, which it inflated, fails because CofC is not bound to use Carolina for repairs. Therefore, the protest is denied.

However, the CPO issues a stern warning to Carolina to comply fully with the requirements of the IFB for Item 2, preventive maintenance. Carolina is expected to provide all preventive maintenance services, in compliance with the requirements of the IFB, for the price it bid. The IFB does allow the contractor to request a price adjustment for renewal terms, but requires "Prices shall not be increased during the initial term." [Ex. 1, Price Adjustment – Limited – after Initial Term Only]

CofC is also admonished to pay close attention to Carolina's performance to ensure Carolina's compliance with the requirements for Item 2, preventive maintenance.


R. Voight Shealy
Chief Procurement Officer
for Supplies and Services



Date

Columbia, S.C.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision under subsection (4) of this section shall be final and conclusive, unless fraudulent, or unless any person adversely affected by the decision requests a further administrative review by the Procurement Review Panel under Section 11-35-4410(1) within ten days of posting of the decision in accordance with Section 11-35-4210(5). The request for review shall be directed to the appropriate chief procurement officer, who shall forward the request to the panel, or to the Procurement Review Panel and shall be in writing, setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person may also request a hearing before the Procurement Review Panel.

Additional information regarding the protest process is available on the internet at the following web site:
www.procurementlaw.sc.gov

FILING FEE: Pursuant to Proviso 66.1 of the 2005 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2005 S.C. Act No. 115, Part IB, § 66.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003). Copies of the Panel's decisions are available at www.procurementlaw.sc.gov.

Martin, Deb

From: Protest-MMO
Sent: Thursday, October 16, 2008 4:45 PM
To: _MMO - Procurement; Shealy, Voight
Subject: FW: Protest of Award of Contract: HVAC Maintenance-College of Charleston: Solicitation Number 5400000532
Attachments: Protest of Award Solicitation 5400000532.pdf

From: Hackett, R Dean[SMTP:RDHACKETT@TRANE.COM]
Sent: Thursday, October 16, 2008 4:45:04 PM
To: Protest-MMO
Subject: Protest of Award of Contract: HVAC Maintenance-College of Charleston: Solicitation Number 5400000532
Auto forwarded by a Rule

To the Chief Procurement Officer, Materials Management Office:

Pursuant to the protest provisions of the referenced College of Charleston *Initiation to Bid*, Trane Comfort Solutions, Inc. hereby files the attached Protest of Award of Contract

Regards,

R Dean Hackett

LEED Accredited Professional

General Manager

Trane Commercial Systems - Ingersoll Rand

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10/20/2008



Trane - Carolinas District

2011 Clements Ferry Road
Charleston, SC 29492
TEL 843-881-8282
rdhackett@trane.com

R Dean Hackett
General Manager
Trane Charleston

October 16, 2008

VIA Email To protest-mm@mmo.state.sc.us and VIA Facsimile at 803-737-0639

Chief Procurement Officer
Materials Management Office
1201 Main Street - Suite 600
Columbia, SC 29201

RE: **PROTEST OF AWARD OF CONTRACT**
HVAC Maintenance - College of Charleston
Solicitation Number: 5400000532
Date Issued: 09/02/2008
Procurement Officer: Cooper Marlowe
Posting Date of Statement of Award: 10/08/08 to Carolina Chillers, Inc.
Contract Number: 4400000344

On October 1, 2008, Trane Comfort Solutions Inc. ("Trane") timely filed its bid in the referenced solicitation for a multi-term contract for serious preventative maintenance inspections and mechanical repairs for 584 pieces of residential HVAC equipment at various locations all across the College of Charleston campus, Charleston, SC.

The Solicitation Line Item Schedule provided for Two (2) bid items. Line Item 1 for labor and materials to provide mechanical repairs and/or replacement as necessary for the HVAC units, and Line Item 2 for all necessary labor and materials to provide annual preventive maintenance for the residence housing units set out in Appendix "A" to the Solicitation.

Trane bid a total of \$132.00 for Line Item 1, and \$35,868.20 for Line Item 2, for a total bid price of \$36,019.20. As an actual bidder, Trane protests the award of contract to Carolina Chillers ("Chillers") on the following grounds:

Trane contends that Chillers' Line Item 2 bid price of \$2,222.00 is unreasonable. The annual preventive maintenance ("PM") required for the listed equipment shown in Appendix "A" is set out in the Solicitation, Section III, *Scope of Work/Specifications*, which provides in part that, "All components of all units shall be inspected for proper operation, cleaned thoroughly (disassembling/reassembling as required) and repaired. Simple repairs/adjustments requiring no replacement parts (other than filters and belts) are expected to be included in the base price of the PM scope of work." This general description is followed by a list of specific maintenance requirements for the equipment.

At the hourly rate quoted by Chillers, the PM services on an annual basis must be performed in 1.3 minutes per piece of equipment, a task that we contend is physically impossible, and at a price of \$3.81 per piece of equipment, which is far less than the reasonable expectation of market value in the State of South Carolina.

Trane further contends that Chillers' bid is materially unbalanced on its face. As stated, the \$2,222.00 price for the PM work in Chillers' Line Item 2 bid is significantly less than the reasonable cost of that work, while Chillers' exorbitant Line Item 1 \$176.00/hr labor bid price is significantly overstated in relation to the cost for repairs and/or replacement work. This bid scheme makes it probable that the College of Charleston will be beset with a significant number of requests for repairs resulting in an unreasonable financial challenge to the maintenance budget of the College, and raises reasonable doubt that the bid will result in the lowest overall cost to the State of South Carolina.

For the foregoing reasons, Trane requests that the Chief Procurement Officer determine the bid price submitted by Chillers for preventive maintenance to be unreasonable, reject its bid, and award this contract to Trane Comfort Solutions, Inc.

Respectfully submitted,



R. Dean Hackett
General Manager
Trane Charleston
RDH/hk